IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.68 OF 2002

1. Indian Silk Manufacturing Company Private Limited, a Company incorporated under the provisions of the Companies Act, 1956, having its registered office and factory at 4th floor, R.No.41-A, Todi Industrial Estate, Sun Mill Compound, Lower Parel, Mumbai-400 013.

2. Sohan M. Shah, the Managing Director and Shareholder of the first petitioner having his office at 4th floor, R.No.41-A, Todi Industrial Estate, Sun Mill Compound, Lower Parel, Mumbai-400 013. .... Petitioners

- Versus -

1. State of Maharashtra

2. Minister of State for Energy, Mantralaya, Mumbai-400 032.

3. Brihanmumbai Electric Supply & Transport Undertaking, having their office at Electric House, Colaba, Mumbai. .... Respondents

Sarvasri Gaurav Joshi i/b Raj Baid for the Petitioners.

Shri G.W. Mattos, Asst. Government Pleader, for the Respondent Nos.1 and 3.

Sarvasri Phiroze Palkhiwala with S. Chitnis i/b M/s. Crawford Bayley & Co. for the Respondent No.2.

CORAM: R.M.S. KHANDEPARKAR, J.

DATED: OCTOBER 14, 2004

JUDGMENT:

1. The petitioners challenge the action on the part of the respondent Nos.2 and 3 in seeking to demand the electricity charges on monthly average basis for the period from 8-12-1993 to 18-9-1995 by issuing supplementary bills, firstly on 18-10-1996 and subsequently on 21-12-2001, being arbitrary, mala fide and illegal. The challenge is three-fold: firstly on the ground that the respondents are not entitled to raise any supplementary bill for a period exceeding six months in view of the provisions of Section 26(6) of the Indian Electricity Act, 1910, hereinafter called as "the said Act", secondly that the respondents are not entitled to estimate the electricity consumption charges on average monthly consumption basis, and thirdly that the supplementary bill would result in crippling effect on the business of the petitioners.

2. The undisputed facts of the case are that the petitioners receive electric supply to their premises at Todi Industrial Estate through three meters - one being for commercial lighting, the other being for industrial lighting and the third, which is the subject matter of

the petition, for the workshop. A meter bearing No.861074 was installed on 4-7-1988 for the workshop of the petitioners. On request by the petitioners for a higher capacity meter, a meter bearing No.910644 of higher capacity was installed on 20-4-1990 in place of the earlier meter No.861074. As the said meter was found damaged, the same was replaced on 3-9-1990 by another meter No.900089. However, as the said meter functioned correctly till 25-8-1993, but thereafter was found damaged and therefore was also replaced by a new meter bearing No.880312 on 8-12-1993. This meter after recording 2248 units during the period upto 22-2-1994 completely stopped functioning thereafter and consequently the consumption of electricity supply through the said meter remained unmeasured since that till 18-9-1995, when the said meter was replaced by a new meter bearing No.820057. In other words, during the period from 8-12-1993 till 22-2-1994 the consumption of electricity supply was recorded as that of 2248 units in the meter bearing No.880312 and thereafter it stopped recording the consumption of electricity supply till 18-9-1995.

3. The facts of the case further disclose that the petitioner No.1 received from the respondent No.3 the letter dated 18-10-1996 seeking to claim electricity charges for the period from 18-12-1993 to 18-9-1995,

hereinafter called as "the relevant period", amounting to Rs.6,68,951.11 ps. having been calculated on an average of 7455 units per month based on the consumption of electricity for the workshop of the petitioner for the period from 22-10-1992 to 25-8-1993. By letter dated 17-4-1994 by the Advocate for the petitioners, the Electrical Inspector was requested to register the dispute for consideration and to decide the same after hearing the petitioners. Accordingly, in terms of the letter dated 10-7-1997, the Electrical Inspector informed the petitioners regarding registration of the dispute under Section 26(6) of the said Act. The petitioners furnished zerox copies of the necessary documents to the Inspector along with the letter dated 11-7-1997. Under the letter dated 14-7-1997 by the respondent No.3, the petitioners were informed that the meter No.880312 was not recording correct consumption as it was defective and therefore has amended the bills for the relevant period on an average of 7455 units per month calculated on the basis of the consumption of electric supply disclosed from the meter correctly recording the same for the period from 22-10-1992 to 25-8-1993 and accordingly the amount of Rs.6,68,951.11 ps. was due from the petitioners which was required to be paid within seven days to avoid disconnection of electric supply. On 12-2-2000 the petitioners received the Inspector’s order dated 5-2-2000 upholding the

contention of the respondent No.3 that the provision of Section 26(6) of the said Act were not applicable to the facts of the case and that therefore the complaint of the petitioners was rejected. On 16-3-2000 the petitioners received final notice calling upon the petitioners to pay the said amount within seven days. The petitioners filed Writ Petition No.756 of 2000 and by order dated 30-3-2000 the petitioners were permitted to approach the appropriate Government in terms of the provision of Section 36(2) of the said Act within four weeks subject to the petitioners paying 40% of the total amount claimed by way of the supplementary bill within four weeks and thereupon the respondents were directed not to take any coercive action and not to disconnect the electric supply for the said period of four weeks. On 24-4-2000 the petitioners deposited 40% of the amount claimed by the respondent No.3 in terms of the said order of the Court and also filed an appeal before the respondent No.2. On 22-11-2001 the petitioners received the order dated 6-11-2001 passed by the respondent No.2 confirming the order passed by the Electrical Inspector and thereby upholding the contention of the respondent No.3 that the provisions of Section 26(6) of the said Act were not attracted in the facts and circumstances of the case. The petitioners thereupon received demand notice dated 21-12-2001 calling upon the petitioners to pay the balance amount of Rs.4,01,370.67 ps. within

seven days of the receipt of the said notice to avoid disconnection of the electric supply. The petitioners thereupon filed the present petition and while issuing rule, this Court passed the following order:-

> "The Petitioners have already deposited Rs.3.50 lacs with the Respondent No.2. They are continuing to pay the correct bills.
>
> Whether it is a case of defective meter or stop-meter will have to be decided. For some period it appears that the meter was running and it had not stopped. It is possible that the meter might have been defective if it had intermittently worked and stopped. In these circumstances the consumer will have to be prima facie given benefit of doubt. Here the petitioners have already deposited more than 50% of the claim. Finally if the petitioners would lose they will have to pay the balance with interest as would be directed by the Court at that time finally and if the Petitioners would succeed they would be entitled to get

refund with interest."

With the above observations, by way interim relief the respondent No.3 was restrained from enforcing the impugned orders dated 6-11-2001 and 21-12-2001.

4. In the course of hearing of the arguments, placing reliance in the decisions in the matter of **Matadin Ishwari Yadav v. Maharashtra State Electricity Board,** reported in 1997 VLJ 588 and **Municipal Corporation of Brihan Mumbai v. Hotel Hill Top International, Mumbai,** reported in 2004 (1) Mh.L.J. 1009, the learned Advocate appearing for the petitioners has submitted that the entire action on the part of the respondent No.3 in issuing the supplementary bill is without any authority and, therefore, cannot be enforced against the petitioners. It is further sought to be contended that the annexures to the affidavit in reply and particularly the copy of the Inspector’s report dated 21-3-1995 itself disclose that the petitioners had made grievance about issuance of the nil bill in relation to the meter No.880312 and it was to the knowledge of the respondent No.3 that the concerned meter was not functioning and it had stopped recording the consumption since February 1994 and therefore it was not permissible for the respondent No.3 to issue supplementary bill for the relevant period in 1996 or in 2001 and therefore both

the bills need to be quashed and set aside. It was sought to be contended that it was duty of the respondent No.3 to ensure that the meter which was functioning properly was being installed at the premises of the petitioner to measure the electric supply to the premises of the petitioners and having failed to perform its duty and having neglected to take appropriate steps in time and even for a period of six months after the defect in the meter was recorded, it was not permissible for the respondent No.3 to issue a supplementary bill and to claim the charges retrospectively and in any case beyond the period of six months in view of the provision of law contained in Section 26(6) of the said Act. According to the learned Advocate for the petitioners, there is no provision in the said Act which empowers the respondent No.3 to issue any such supplementary bill and this has been the law laid down by this Court in **Hotel Hill Top International's** case (supra). In any case, there can be no claim for the alleged arrears for the period beyond six months in terms of the provision of law contained in Section 26(6) of the said Act as well as the decision of the Division Bench in **Matadin Ishwari Yadav's** case (supra). The petitioners also placed on record the copies of the bills which were issued to the petitioners by the respondent No.3 regarding the supply of electricity to their workshop during the period from 22-11-1993 to 22-9-1995. The same were taken on record

as there was no objection on the part of the respondents for filing those documents on record in the course of the arguments. Drawing my attention to the letter dated 14-7-1997 it was sought to be contended that it was not a case of stop meter but it is a case of the meter being defective and therefore non-recording of the correct consumption of the electric supply and therefore it would fall within the jurisdiction of the Electrical Inspector to deal with the dispute under Section 26(6) of the said Act.

5. The learned Advocate appearing for the respondent No.3 submitted that the petition as it stands today restricts the challenge to the impugned orders dated 6-11-2001 and 21-12-2001 being Exhibits ‘I’ and ‘J’ respectively and there is no challenge to the bill dated 18-10-1996 and that the petitioners are not entitled to enlarge the scope of the petition at the eleventh hour. According to the learned Advocate for the respondent No.3, the petition does not disclose any challenge to the bill dated 18-10-1996. According to the learned Advocate for the respondent No.3, no quarrel can be made as regards the law laid down by the Division Bench in Matadin Ishwari Yadav’s case but there is no scope for application of the decision in Hotel Hill Top International’s case to the facts of the case in hand which are totally different from the facts of Hotel Hill

Top International's case as well as that the said decision was given in the peculiar facts of the case and that is apparent from the decision itself. Referring to the amendment sheets annexed to the affidavit in reply, the learned Advocate for the respondent No.3 pointed out that it is not disputed fact that since February 1994 till 18-9-1995 the meter in question did not record any consumption of electric supply though in fact such supply was made and enjoyed by the petitioners. He further submitted that the records clearly disclose that during the period from 8-12-1993 till 22-2-1994 only 2248 units were shown in relation to the quantum of the consumption of electric supply by the workshop of the petitioners when the earlier period invariably disclosed more than 7000 to 8000 units per month, at times it was being 15000 to 20000. According to the learned Advocate for the respondent No.3, no fault can be found with the impugned order as the law laid down by the Division Bench as well as in the Hotel Hill Top International's case in relation to the scope of powers of the Electrical Inspector under Section 26(6) of the said Act clearly bars proceedings under the said provision of law in case where there is no dispute about the fact that the meter had stopped functioning or that there was no recording made in relation to the consumption of electricity which was undisputedly enjoyed by the consumer. He further submitted that once it is

established that the electric supply was enjoyed by the consumer and yet such consumption was not recorded by the meter, considering the obligation of the consumer to compensate the licensee for the supply enjoyed by the consumer, only reasonable method which can be evolved to measure the supply is to take into consideration the average monthly consumption on the basis of the consumption during the preceding months and as a common practice the period of six months to one year is considered as the reasonable period to ascertain the average monthly consumption. The same procedure having been followed in the case in hand and undisputedly there was no objection at any time on behalf of the petitioners to apply such procedure and it was to the knowledge of the petitioner, it is too late in the day for the petitioners to raise objection against applying such procedure to ascertain the quantum of electricity consumed by the petitioners during the period during which the meter did not record the consumption of such supply and therefore no fault can be found with the supplementary bills issued to the petitioners in relation to the relevant period. Further, drawing attention to the various bills which are produced by the petitioners in the course of the hearing, it was also submitted that the those bills clearly disclose that though the other two meters were disclosing the consumption of electric supply which apparently

disclosed the regular functioning of the establishment of the petitioners, yet the meter in question did not record the consumption for the workshop of the petitioners. He has further submitted that it is not the case of the petitioners that his workshop had stopped functioning or that no electricity was consumed through the meter in question. Referring to Section 26 and the Rules framed regarding the conditions of electricity supply to the consumers, the learned Advocate has submitted that the practice clearly disclose an agreement for calculation of unrecorded consumption by following the application of the average consumption rule.

6. Upon hearing the learned Advocates for the parties and on perusal of the records, the following points arise for consideration:-

(i) whether the respondent No.3 is entitled to raise the supplementary bill for a period exceeding six months considering the provision of Section 26(6) of the said Act?

(ii) whether the supplementary bill can be on the basis of the monthly average consumption for the period preceding the

period during which the meter had stopped functioning? and

(iii) whether adverse effect, if any, on the business of a consumer would disentitle the respondent No.3 to claim charges for electricity supplied but not measured, however, undisputedly consumed by the consumer?

7. The materials placed on record undisputedly disclose that the meter bearing No.880312 was installed for the workshop of the petitioners on 8-12-1993 and till 22-2-1994 there were 2248 units consumption of supply recorded in the said meter. From 22-2-1994 till 18-9-1995 though the said meter continued to have been installed for the workshop of the petitioners, it did not record any consumption of electricity supplied to the petitioners' workshop. Nevertheless, it is not in dispute that the workshop was functioning and the petitioners were enjoying the electric supply for the workshop through the said meter. In other words, even though the quantum of electric supply is not measured by the said meter during the period from 22-2-1994 till 18-9-1995, the petitioners continued to enjoy the supply regularly and as usual. Undoubtedly, from 8-12-1993 till 22-2-1994 the consumption recorded in the said

meter was only 2248 units. Equally it is true, as contended by the learned Advocate for the respondent No.3, that the meter which was installed prior to the meter No.880312 had recorded the consumption ranging from 5624 to 20010 during the period from 22-10-1992 to 25-10-1993; for the period from 22-10-1992 till 23-12-1992 it was 19257 units; for the period from 23-12-1992 to 24-2-1993 it was 20010 units; for the period from 24-2-1993 to 25-4-1993 it was 13792 units; for the period from 25-4-1993 till 24-6-1993 it was 9723 units; for the period till 24-6-1993 to 25-8-1993 it was 11721 units; for the period from 25-8-1993 till 25-10-1993 it was 5624 units and upto 8-12-1993 it was 3993 units. Undisputedly, the meter had stopped functioning properly and therefore it had to be changed on 8-12-1993 and therefore even the recording disclosed on 25-10-1993 to December, 1993 cannot be said to be disclosing the correct consumption of electricity. Of course, there is no dispute in this regard. But the said conclusion is inevitable considering the fact that the meter had stopped functioning properly. Bearing in mind the bi-monthly consumption disclosed from October, 1992 to August, 1993, certainly the monthly average calculated by the respondent No.3 to the extent of 7455 can neither be said to be unreasonable or even on the higher side in any manner. Undisputedly the bill dated 18-10-1996 was prepared on the basis of average monthly

consumption of 7455 units. The same basis are maintained for issuance of the demand for arrears in relation to the said bill after deducting the amount already deposited in terms of this Court's order. In the background of these undisputed facts, the rival contentions are to be considered.

8. The challenge to the supplementary bills being illegal is sought to be argued by the learned Advocate for the petitioners by drawing attention to ground (G) in the petition and contending that the same would disclose the ground in relation to illegality of those bills dated 18-10-1996 as well as 21-12-2001. The ground (G) of the petition reads thus:-

> "(G) The Petitioners say that Respondent No.3 are not entitled to charge the Petitioners retrospectively for the period 8th December, 1993 to 18th September, 1995 in respect of the said Meter No.N 880312. The petitioners say that the aforesaid action of Respondent Nos.2 and 3 in seeking to recover alleged electricity charges for the period 8th December, 1993 to 18th September, 1995 on an average basis is contrary to all cannons of justice and

> equity which provide that a delegated body cannot be permitted to levy a charge retrospectively. The Petitioners say that the aforesaid action of Respondent Nos.2 and 3 is also contrary to the provisions of the Mumbai Municipal Corporation Act, 1888."

Undoubtedly, the facts narrated in the petition do make reference to the bill dated 18-10-1996 as well as of 21-12-2001. However, the grounds disclosed for the challenge in the petition nowhere refer to those bills. On the contrary, they specifically refer to the jurisdiction of the Electrical Inspector under Section 26(6) of the said Act, the period of liability cannot exceed six months and absence of power to levy the charges retrospectively by the delegated body. In other words, the challenge in the petition, as rightly submitted by the learned Advocate for the respondent No.3, is restricted to the order dated 6-11-2001 and failure on the part of the Electrical Inspector to exercise his jurisdiction under Section 26(6) of the said Act. Undoubtedly, there was interim relief in the nature of injunction or stay against the demand notice dated 21-12-2001 which is in relation to the bill dated 21-12-2001. The same was a consequential relief during the pendency of the petition and even assuming it to be

a final relief, the same is being in the nature of consequential relief, there is no substantive challenge to the bill, either dated 18-10-1996 or 21-12-2001, as rightly submitted by the learned Advocate for the respondent No.3.

9. As already seen above, it is not in dispute that for the relevant period the meter had stopped functioning with effect from 22-2-1994. It is not the case of the petitioners that the figure of 2248 units disclosed in the meter on 22-2-1994 was the correct measure of actual consumption of electric supply to the workshop during the period from 8-12-1993 till 22-2-1994. Indeed, no such case was pleaded at any point of time. Merely because the respondent No.3 in the letter dated 14-7-1997 had stated that the old meter was not recording the consumption as per the usage of supply as it was defective, that would not empower the Electrical Inspector to entertain the dispute. The fact that the meter had stopped recording the consumption for the relevant period was never in dispute and once there was no dispute about the fact that the meter had stopped recording the consumption, as already held by this Court in number of decisions, including in the case of Hotel Hill Top International, no fault can be found with the orders passed by the lower authorities rejecting the claim of the petitioners in that regard.

10. Once it is held that the Electrical Inspector had no jurisdiction to exercise his powers under Section 26(6), in the facts and circumstances of the case, the question of restricting the demand for a period of six months under the bills issued to the petitioners does not arise at all as the restriction of six months imposed under Section 26(6) relates to the powers of the Electrical Inspector in cases of dispute which can be entertained under the said provisions of law and it does not apply to other cases. The first ground of challenge, therefore, is devoid of substance.

11. The decision in Matadin Ishwari Yadav's case was in relation to the powers of the Electrical Inspector under Section 26(6) and the restriction of six months in relation to arrears was in respect of the bill to be issued pursuant to the Electrical Inspector's order under Section 26(6) of the said Act and not otherwise and, therefore, the said decision can be of no help to the petitioners in the facts and circumstances of the case

12. As regards the second point for consideration pertaining to the basis for calculating the monthly average consumption during which the supply was enjoyed by the petitioners but was not recorded in the meter, it

is undisputed fact that such a practice is being followed in all cases wherein the meter does not disclose the consumption of supply to the consumer. Even the bills which have been produced in the course of hearing by the petitioners themselves disclose such a procedure being followed invariably in other cases in respect of the other meters also. This is apparent from the bills dated 14-2-1994 and 13-4-1994 in relation to the other two meters. Besides, the bills issued to the petitioners also disclose that the said bills were issued subject to adjustment in the next bill to be issued based on actual consumption. A clear endorsement to that effect is seen to have been made in number of bills issued to the petitioners. In other words, in cases where the consumption is not recorded either on account of stoppage of meter or even the meter being defective, it does not prohibit the licensee from issuing supplementary bill after ascertaining the actual consumption during the said period by adopting the average basis method, which has been adopted by the respondent No.3 in the case in hand.

13. The contention against the application of average basis is totally devoid of substance considering the provision of Section 26(1) of the said Act. The Section 26(1) clearly provides that "In the absence of an agreement to the contrary, the amount of energy supplied

to a consumer or the electrical quantity contained in the supply shall be ascertained by means of a correct meter, ...". In other words, the methodology for measuring the supply of electricity is invariably to be with the help of a meter, unless otherwise agreed upon between the parties. It is well-settled law that an agreement can also be derived from the conduct of the parties and it can also be an implied agreement. The various bills issued to the petitioners clearly disclose adoption of average basis method whenever it was not possible for the respondent No.3 to ascertain the exact amount of consumption either on account of stoppage of meter or defect in the meter. It is not in dispute that any such method was objected to by the petitioners at any earlier point of time. It is only when the bill in question i.e. the bill dated 18-10-1996 was served upon the petitioners, it was sought to be objected to. However, the objection was not on account of adoption of average basis rule but mainly on account of non-application of the provision of Section 26(6) of the said Act, which restricted the powers of the Electrical Inspector to ascertain the arrears to the extent of six months. The objection regarding adoption of the average basis is strenuously sought to be argued only subsequent to the decision in Hotel Hill Top International’s case. As rightly submitted by the learned Advocate for the respondent No.3, that was a decision in the peculiar

facts of that case. In Hotel Hill Top International's case, the undisputed facts disclosed that irrespective of the fact that the meter was defective and no bills were issued to the consumer in relation to the supply of electricity through such defective meter, the consumer had voluntarily continued to pay regularly on the basis of duplicate bills located from the records of the Corporation and for such relevant period had paid nearly Rs.16 lakhs when the supplementary bill claimed Rs.33 lakhs. In those circumstances, two points were sought to be raised, namely (i) that in the absence of dispute about total stoppage or malfunctioning of the meter, the Electrical Inspector could not have exercised the powers under Section 26(6) of the said Act and particularly at the stage they were exercised, and consequently that the procedure to be followed by the licensee for recovery of the amount of actual quantity of the unit of electricity consumed by the consumer, during the period when the meter to the knowledge of the licensee had undisputedly stopped or was malfunctioning cannot be at the whims and fancies of the licensee but in accordance with the statutory provisions and in the absence of any statutory power to the licensee to recover such arrears by itself, the procedure applicable would be a normal civil remedy. In the circumstances of that case, the first question was answered in the negative holding that there was no dispute about the fact that the actual consumption of

electricity by the said Hotel was not recorded in the meter in question in the said petition and therefore there was no dispute which could have been entertained by the Electrical Inspector under Section 26(6) of the said Act. As regards the second question, it was held that:-

> "Merely because the petitioner itself had failed to take appropriate steps to replace the meter inspite of the fact that the respondent No.1 had brought to the notice of the petitioner that the meter was not functioning properly, that would not empower the petitioner to insist for the payment of the supplementary bill, alleged to have been prepared in relation to the supply which was allegedly consumed by the establishment of the respondent No.1 for the period prior to the date of inspection of the meter by the petitioner and when it was found to be defective, but such liability being disputed by the respondent No.1. Once such liability is disputed, in the facts and circumstances of the case, it is necessary to adjudicate such dispute in

> accordance with the provisions of law and by the competent Court or the authority duly empowered in that regard and to decide the same in accordance with the provisions of law."

Apparently, the ruling was given taking into consideration the provisions of law and the peculiar facts of the case and the observations regarding the liability being disputed and the necessity to adjudicate the said dispute by following the normal civil law were in the peculiar facts and circumstances of the case. Being so, the said ruling would not apply to the case in hand. It is also to be noted that the petitioners in the case in hand of their own never reported about the stoppage of functioning of the meter till the grievance in that regard was sought to be made at the time of inspection carried out on a complaint regarding "high bills". This is apparent from the report of the Electrical Inspector dated 21-3-1995.

14. In the facts and circumstances of the case in hand, therefore, the electrical inspector has no jurisdiction to deal with the dispute as the matter related to "stop meter" and considering the procedure followed, which in turn disclose implied agreement, relating to the authority of the respondent No.3 to claim charges by

issuing supplementary bills for the period for which no consumption was recorded in the meter though actually the consumer had enjoyed the supply of electricity for such period in respect of which the supplementary bill is issued and that the basis for calculating the charge for such period is by way of ascertaining the same by taking average consumption for the preceding period of six months to one year, and further that the same procedure has been followed by the respondent No.3 in the case in hand in relation to the supplementary bill issued to the petitioners. Being so, the impugned demand does not disclose any illegality or arbitrariness or mala fide.

15. As regards the third point for consideration, it is needless to say that adverse effect on the business of the consumer would not entitle the consumer to enjoy free supply of electricity and therefore the contentions in that regard to challenge the impugned action are absolutely devoid of substance.

16. For the reasons stated above, therefore, there is no substance in the challenge by the petitioners and hence, the petition is liable to be dismissed and is accordingly hereby dismissed. The rule is discharged with no order as to costs.